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In the

SUPREME COURT OF THE UNITED STATES

October Term, 1964

DAN TEHAN, SHERIFF OF HAMILTON COUNTY, OHIO,

Petitioner,

v.

UNITED STATES OF AMERICA, EX REL. EDGAR I. SHOTT, JR.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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SUBJECT INDEX

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in the above entitled case on November 10, 1964.

OPINION BELOW

The decision and opinion of the United States Court of Appeals for the Sixth Circuit is reported in 337 F. (2d) 990.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on November 10, 1964. The juris-

diction of this Court is invoked under 28 U. S. C., Section 1254 (1).

QUESTION PRESENTED

Whether the protection against self incrimination under the Fifth Amendment includes not only the right of defendant not to take the stand as witness in his own behalf, but also the right that such refusal shall not be commented upon by counsel for the prosecution, where the Ohio Constitution and statute specifically provide the opportunity to comment?

STATEMENT OF THE CASE

On the twelfth day of May, 1961, an indictment against Edgar I. Shott, Jr. was returned by the Grand Jury of Hamilton County, Ohio, to the Court of Common Pleas. In two separate counts in the indictment Shott was charged with selling a security without a license in violation of *Section 1707.44 (A), Revised Code of Ohio,* and selling a non-registered security in violation of *Section 1707.44 (C), Revised Code of Ohio.* Shott pleaded not guilty on arraignment, and upon trial was found guilty by a jury of both charges. The Court sentenced him to the Penitentiary for a period of 1-5 years.

The Court of Appeals of the First District of Ohio, and the Supreme Court of Ohio, subsequently affirmed the judgment. An appeal to the United States Supreme Court was dismissed, but was treated as an application for a writ of certiorari, which was denied. A petition for re-hearing was also denied.

The Supreme Court of Ohio issued a mandate to Dan Tehan, Sheriff of Hamilton County, Ohio, to carry into

effect the sentence imposed by the Court of Common Pleas. Shott filed a habeas corpus proceeding in the United States District Court for the Southern District of Ohio, Western Division. After oral argument the proceeding was dismissed by the District Judge, from which order the petitioner appealed to the United States Court of Appeals for the Sixth District. The Court of Appeals set aside the order of the District Court and remanded the case to the District Court for further proceedings.

STATEMENT OF FACTS

Patrick Sestito, a resident of Cincinnati, Ohio, in the latter part of the Summer of 1960, heard about investment opportunities with the defendant from certain car dealers on Reading Road, Cincinnati, Ohio. (R. 27) On September 28, 1960, with $2,000.00 in his pocket, Sestito went to the office of Edgar I. Shott, Jr., in the Atlas Bank Building, Walnut Street, Cincinnati, Ohio. He had not been in previous contact with the defendant concerning investments, and had not been contacted by the defendant in any manner. Mr. Sestito and the defendant had a discussion about investing the money of Mr. Sestito in buildings and financing. (R. 18, 19). At the time Shott explained the workings of the Shott Investment Company to Mr. Sestito and showed him a draft of the progress of the Shott Investment Company from its inception. (R. 20, 21).

Mr. Sestito was satisfied with the 12½% profit for a period of 62 days offered by the defendant, and he entrusted his $2,000.00 to the defendant and received a promissory note for the money. (R. 21). The note stated that Mr. Shott would pay the sum of $2,250.00 to Patrick Sestito on November 29, 1960.

On the due date the secretary of the defendant called Mr. Sestito and asked him if he wanted to "let the note

ride," or, in other words, to reinvest it. (R. 24). Mr. Sestito decided against reinvestment with the Shott Investment Company, went to the office of the defendant, and received a check of the defendant in full payment of the amount of the note. (R. 25).

The defendant was not licensed with the Division of Securities of the State of Ohio (R. 12), and the security had never been registered with the department of Securities of the State of Ohio. (R. 13).

REASONS FOR GRANTING THE WRIT

The trial of the case of *State of Ohio* v. *Edgar I Shott, Jr.* was so unique and so different from the usual presentation of evidence to a jury that it must be considered an exception. As an exception to the usual presentment of fact it necessarily follows that it is an exception to the usual application of law. A basic tenet was recently stated by Justice Brennan in *Fay* v. *Noia,* 372 U.S. 391, at page 440:

> "Each case must stand on its facts."

In this case we feel that the application of the concept of the law which does not take the facts into consideration would destroy our direction in the fulfillment of the law.

We are aware at this writing that the Supreme Court of the United States has granted certiorari in *Eddie Dean Griffin, petitioner,* v. *State of California,* 202, October Term, 1964. In the general broad terms of law the first question presented in the *Griffin* case is similar to the question in the *Shott* case. The State of Ohio has a provision in its *Constitution, Article I, Section 10,* in part as follows:

> "* * * No person shall be compelled, in any criminal case, to be a witness against himself; but his failure to testify may be considered by the court and jury and may be the subject of comment by counsel * * *"

Because Ohio's constitutional provision is similar in scope to the California Constitution's Article I, Section 13, in the trial of the *Shott* case, as well as the trial of the *Griffin* case, counsel availed themselves of the opportunity granted by their respective Constitutions to comment on the failure of the respective defendants to take the stand in his own behalf. Without recognizing a difference in the facts of the trial it would appear that a broad legal brush could cover both cases.

In *Malloy* v. *Hogan*, 378 U.S., page 1 (1964), the Supreme Court held that the Fifth Amendment privilege against compulsory self incrimination is protected by the Fourteenth Amendment against abridgment by the states. The question in *Griffin*, which the Supreme Court must decide, is whether comment by the prosecution on the failure of the defendant to take the stand as a witness in his own behalf is a violation of the privilege against compulsory self incrimination.

The United States Court of Appeals for the Sixth Circuit, in the case of *United States of America ex rel. Edgar I. Shott, Jr.* v. *Dan Tehan, Sheriff of Hamilton County, Ohio*, No. 15538, in an opinion filed November 10, 1964, decided a similar issue. The Court found:

> "* * * The protection against self incrimination under the Fifth Amendment includes not only the right to refuse to answer incriminating questions, but also the right that such refusal shall not be commented upon by counsel for the prosecution."

The decision of the United States Court of Appeals for the Sixth Circuit may very well be similar to the decision of the United States Supreme Court in *Griffin*. Even in this event we contend that the decision in the *Shott* case in the Court of Appeals should be reversed. Of course, if the Supreme Court in the *Griffin* case holds contrary to the

decision of the Court of Appeals in *Shott,* a reversal would be in order.

Our main contention in requesting a reversal is that Shott, by his admission of, and acquiescence in, the stipulations, concessions and agreements made by counsel in open court in his opening statement to the jury, and by Shott's acceptance of the comment made by his counsel in final argument on his failure to take the stand, waived his constitutional rights under the Fifth Amendment.

On the first day of trial, the defendant being present, one of the defense counsel spoke to the jury as follows: (R. 6)

> "As you have been told, the defendant, Ed Shott, is a lawyer, actively engaged in the practice of law in his community. He is being tried for an alleged violation of the Ohio Securities Law, better known as the Blue Sky Law. If I seem to be reading a portion of my opening statement, it is because the defense believes that the whole, unmitigated truth, told accurately and precisely, will establish the defendant's innocence. I am, therefore, not permitting myself that margin of error which is inevitably inherent in any extemporaneous statement, no matter how carefully it may be prepared. * * *
> The evidence will show that this defendant did not have a license to sell securities, and we will agree that he did not have a license. The evidence will show that Mr. Shott never registered a security, or anything which these prosecuting attorneys believe to be a security, with the Division of Securities. We will agree that he never so registered anything purporting to be of that character."

And shortly thereafter counsel on behalf of the defendant, Shott, said further: (R. 8)

> "* * * which we will admit constitutes a promissory note."

The Court: "I didn't quite get that."
Mr. Lloyd: "I say it was reduced to a writing, which we will admit constitutes a promissory note."

Counsel continued in his reading and said: (R. 8)

"Now, the defendant will admit and concede precisely what his idea, what his scheme, plan and system was in entering into this loan transaction with Pat Sestito. It was simply this: The defendant was loaning money to one Leslie D. Stickler, who was borrowing it regularly from him for the purpose, according to Stickler, of enabling Stickler to make short-term, high-interest loans to contractors. When Shott borrowed the money from Sestito, it was his intention: that is, Shott's intention and plan to loan this money to Stickler, and to pay Sestito for the use of his money; that is, Sestito's money, one-half of the amount which Stickler had agreed to pay Shott for the use of Shott's money."

We wholeheartedly agree with the law laid down by the Supreme Court in *Gideon* v. *Wainwright,* 372 U.S. 335, that a person charged with a crime must be accorded counsel in order for that person to receive the due process of law. We contend that to that right is the responsibility of being bound by the distinct and formal admissions of fact made by counsel at the trial in open court. We contend that in this case, in this formal and solemn atmosphere, the defendant, Shott, himself a lawyer, rested, and by his silence accepted and adopted the stipulations and admissions of his lawyer. The relationship of these men was such that the words and actions of the agent were those of the principal. The defendant was in complete accord with the words uttered, and at no time gave the slightest indication of rebuke or rejection. The Court accepted these stipulations as part of the Record of the case.

The United States District Court for the Southern District of Ohio, Western Division, in its memorandum opin-

ion and order filed July 9, 1963, was also impressed by the admissions of the defendant, and stated as follows: (page 4)

> "Petitioner has argued that the charge of the Court was tantamount to the direction of a verdict for the State. To the extent that there is accuracy in this contention, it resulted from the frank admission of the petitioner of the factual situation involved; in fact, the most damning case against him heard by the jury was contained in his opening statement. His admissions on the record resolved most issues, but at least one important issue was presented to the jury. That issue was whether or not there had been a direct or indirect offering of the securities for sale to the public. The record contains evidence on this point, and it was properly submitted to the jury without depriving petitioner of his constitutional rights."

There can be no doubt that a defendant has the power to waive a constitutional right. *Johnson* v. *Zerbst,* 304 U.S. 458. It has long been a law of Ohio and elsewhere that an attorney has the power to bind his client. In *Syllabus 2* of *Garrett* v. *Hansue,* 53 O.S. 482, the Supreme Court of Ohio held as follows:

> "An attorney of record has power to do on behalf of his client all acts, in or out of court, necessary or incidental to the prosecution, defense or management of the action, and which affect only the remedy and not the right, and this includes the power to waive objections to evidence and enter into stipulations for the admission of facts on the trial."

In normal sequence, the defendant being present, his defense counsel addressed the jury in his final argument and stated: (R. 54)

> "Now, I would like to meet head-on his allegation that the defendant did not take the stand in this case and

that he is indicating his guilt because he is not taking the stand. I will tell you why the defendant did not take the stand in this case. Because I refused to let him take the stand * * *"

The State contends that the defendant testified in the trial through the lips of his counsel, and thereby waived his constitutional privilege to refuse to testify in his own behalf. There can be no doubt that the presentment and comment by counsel of the defendant was a well prepared plan participated in by the defendant. Even though the defendant did not perform the physical act of taking the witness stand he cannot now be heard to say that he did not present evidence to the jury in his own behalf.

In like manner, defendant and his counsel consumed a full day to present the final argument to the jury in behalf of the defendant. As the defendant sat by he permitted his counsel to read from the prepared final argument, during which counsel attempted to explain the reason that the defendant did not take the witness stand. This action of the defendant and his counsel in so doing waived the constitutional privilege of the defendant under these circumstances.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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CALVIN W. PREM
Ass't Prosecuting Attorney
HARRY C. SCHOETTMER
Ass't Prosecuting Attorney
Attorneys for Petitioner

APPENDIX A

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Fifth Amendment, United States Constitution:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Article I, Section 10, Ohio Constitution:

"Except in cases of impeachment, cases arising in the army and navy, or in the militia when in actual service in time of war or public danger, and cases involving offenses for which the penalty provided is less than imprisonment in the penitentiary, no person shall be held to answer for a capital, or otherwise infamous, crime, unless on presentment or indictment of a grand jury; and the number of persons necessary to constitute such grand jury and the number thereof necessary to concur in finding such indictment shall be determined by law. In any trial, in any court, the party accused shall be allowed to appear and defend in person and with counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof; to meet the witnesses face to face, and to have

compulsory process to procure the attendance of witnesses in his behalf, and a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed; but provision may be made by law for the taking of the deposition by the accused or by the state, to be used for or against the accused, of any witness whose attendance can not be had at the trial, always securing to the accused means and the opportunity to be present in person and with counsel at the taking of such deposition, and to examine the witness face to face as fully and in the same manner as if in court. No person shall be compelled, in any criminal case, to be a witness against himself; but his failure to testify may be considered by the court and jury and may be made the subject of comment by counsel. No person shall be twice put in jeopardy for the same offense."

Section 2945.43, Revised Code of Ohio:

"On the trial of a criminal cause, a person charged with an offense may, at his own request, be a witness, but not otherwise. The failure of such person to testify may be considered by the court and jury and may be made the subject of comment by counsel."

APPENDIX B

In the

UNITED STATES DISTRICT COURT
For the Southern District of Ohio
Western Division

Civil Action No. 5376

UNITED STATES OF AMERICA, EX REL. EDGAR I. SHOTT, JR.,
Relator,

v.

DAN TEHAN,
Sheriff of Hamilton County,
Respondent.

MEMORANDUM OPINION AND ORDER
(Filed July 9, 1963.)

Petitioner was named in a two-count indictment returned by the grand jury of Hamilton County, Ohio and after trial was found guilty by a petit jury under both counts. Having exhausted his state remedies, and certiorari having been denied by the Supreme Court of the United States, petitioner has instituted this habeas corpus action to test the constitutionality of the proceeding resulting in his conviction. The indictment was returned under the

provisions of the Ohio Securities Act, more commonly referred to as the Blue Sky Law (Ohio Revised Code 1707.01 through 1707.45). The first count charges the petitioner with having sold a security without having been licensed to make such a sale, and the second charges the sale of an unlicensed security. Both counts deal with one sale of a single security, and the evidence was limited to that transaction.

The entire factual presentation at trial was contained in the testimony of two witnesses and three documentary exhibits. The first witness and two of the exhibits dealt with conceded matters, establishing for the record the facts that petitioner was not licensed under the Ohio Securities Act to deal in securities, and that the instrument forming the basis of the indictment was not a registered security. The remaining exhibit was that instrument, a promissory note payable to the order of one Patrick Sestito and made by "Shott Investment Co., By: Edgar I Shott, Jr. [the petitioner]." Patrick Sestito was the other witness, and his testimony dealt with his past and present relationship with petitioner and the circumstances of the transaction.

Referring to the promissory note, the trial court charged the jury, "on its face it is a security . . .," and were the issue before us we would not hesitate to concur. However, the question is purely one of statutory interpretation and has been laid to rest in the appellate procedures which preceded this action.

Petitioner complains vigorously that he was deprived of a fair trial in violation of his constitutional rights by a portion of the prosecuting attorney's closing argument referring generally to the probability that petitioner negotiated similar promissory notes to other persons. These statements consumed a dozen lines in sixteen pages of summation in the printed record, and their exclusion might

have been prudent. However, the trial court acted within the proper exercise of discretion in permitting this argument as being based upon inferences from the testimony, and it cannot now be said that petitioner was thereby deprived of any constitutional right. Without detailed elaboration, it is pointed out that the record establishes that Sestito went to petitioner's office with $2,000 in his pocket, where petitioner told him "that this money was being invested on financing buildings, and so forth;" that Sestito first said he thought he "could come up with a thousand, and then it sounded so good, I mean I come up with two thousand;" that asked what "sounded so good," he replied, "the percentage, twelve and a half per cent;" that he was shown some kind of document dealing with the history and condition of the Shott Investment Company; and that the note was not made by petitioner individually, but by an investment company. In this connection, the testimony of Sestito of a telephone call received by him from petitioner's secretary on the due date of the note is interesting. Without objection, he was permitted to testify that she called and asked whether Sestito wanted to "draw down" his money or "parlay" it. He elected the former alternative, and it is hard to reconcile this line of evidence with an intention on Sestito's part to make a personal loan to petitioner, or, in fact, with any intention other than that of making a productive investment. To the extent that any issue on this point is before us in this habeas corpus proceeding we find the position taken by the trial court not to have been improper.

Various other of petitioner's complaints are intertwined with those that have been reviewed and are not felt to merit individual treatment. While at this moment in the history of Federal jurisprudence we are unsure of the extent to which such subjects are reviewable by a District Court in habeas corpus, since we are not of a disposition

differing from the state trial court no problem is presented in this area. We now turn, however, to an issue which is felt to be squarely presented in this action.

That issue deals with the statutory presumption under which after a showing by the state beyond a reasonable doubt of a sale of a security, the burden shifts to the defendant to show the exempt nature of the transaction or security by a preponderance of the evidence. Anticipating an argument, in his brief petitioner recognized the validity of kindred presumptions created upon the showing by the prosecution of possession of morphin, of smoking opium, of an unlicensed still and of policy slips. Without using the phrases, petitioner seems to attempt to make a distinction between things malum per se and malum prohibitum. Whether he quite reaches this argument or not, petitioner does undertake to establish a distinction by contending that "the single Sestito loan transaction is itself neither unusual nor sinister," but we find the argument to be without validity. Specifically, we hold that the statutory presumption, as here applied, was not unlawful as violative of the Fourteenth Amendment to the Constitution, even when considered in the light of the tests laid down in *Morrison* v. *California,* 291 U.S. 82 (1934).

Petitioner has argued that the charge of the court was tantamount to the direction of a verdict for the state. [To the extent that there is accuracy in this contention, it resulted from the frank admission of the petitioner of the factual situation involved; in fact, the most damning case against him heard by the jury was contained in his opening statement. His admissions on the record resolved most issues, but at least one important issue was presented to the jury. That issue was whether or not there had been a direct or indirect offering of securities for sale to the public. The record contains evidence on this point and it was prop-

erly submitted to the jury without depriving petitioner of his constitutional rights.]

Finally, we find nothing so vague or indefinite in the provisions of the Ohio Securities Act found to have been violated as to cause petitioner's conviction to amount to a deprivation of due process of law, and therefore,

IT IS ORDERED that the petition herein should be and it is hereby dismissed, with notation of petitioner's exception.

/s/ JOHN W. PECK, District Judge

APPENDIX C

JUDGMENT ENTRY OF UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

(Filed November 10, 1964.)

No. 15,538

(CAPTION OMITTED.)

Before: MILLER and CECIL, Circuit Judges, and FOX, District Judge.

APPEAL from the United States District Court for the Southern District of Ohio.

THIS CAUSE came on to be heard on the transcript of the record from the United States District Court for the Southern District of Ohio, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the order of the said District Court in this cause be and the same is hereby set aside and the case remanded to the District Court for further proceedings consistent with the opinion.

It is further ordered that Relator-Appellant recover from Respondent-Appellee the costs on appeal, as itemized below, and that execution therefor issue out of said District Court.

Entered by order of the Court.

CARL W. REUSS
Clerk

APPENDIX D

OPINION OF UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

(Decided November 10, 1964.)

No. 15,538

(CAPTION OMITTED.)

Before: MILLER and CECIL, Circuit Judges, and FOX, District Judge.

MILLER, Circuit Judge. Appellant, Edgar I Shott, Jr., a member of the bar of the State of Ohio, was convicted in the state court of a violation of the Ohio Securities Act, generally referred to as the Ohio Blue Sky Law. In the trial at the close of the State's case, appellant's counsel, being of the opinion that the State had not made out a case, did not call appellant as a witness or introduce further evidence, but moved for a directed verdict. The motion was overruled and the case submitted to the jury, which returned a verdict of guilty. Appellant received a sentence of one to five years imprisonment in the state penitentiary.

The judgment was affirmed by both the Ohio Court of Appeals and the Ohio Supreme Court. An appeal to the United States Supreme Court was dismissed, but was treated as an application for writ of certiorari, which was denied. A petition for rehearing was also denied.

Appellant contended in the trial court and on the appeals that the Ohio Blue Sky Law, under which he was convicted, was invalid under the due process clause of the Fourteenth Amendment because it set no ascertainable standard of conduct, required no specific intent, and was so indefinite and vague as to be void. In addition to other defenses, he charged misconduct on the part of the prosecutor in closing argument to the jury in improperly commenting upon the failure of the appellant to testify.

Following the exhaustion of his state remedies, appellant filed the present habeas corpus proceeding in the United States District Court, which, after oral argument, was dismissed by the District Judge, from which order the present appeal was taken. The District Judge entered the necessary Certificate of Probable Cause required by Section 2253, Title 28, United States Code.

The alleged improper comment of the state prosecutor in his closing argument to the jury about appellant's failure to testify raises a constitutional question under the Fifth and Fourteenth Amendments to the United States Constitution, to which we will first direct our attention. We are of the opinion that this issue was properly raised by the present habeas corpus proceeding. *Sections 2241-2254, Title 28, United States Code; Rogers* v. *Richmond,* 365 U.S. 534, 540; *Fay* v. *Noia,* 372 U.S. 391, 420-424; *Irvin* v. *Dowd,* 366 U.S. 717.

Without reviewing the comment of the prosecuting attorney to the jury on appellant's failure to testify, it is sufficient to state that if this case had been tried in the United States District Court for an alleged federal offense, it would have violated appellant's constitutional rights against self-incrimination under the Fifth Amendment to the Constitution of the United States. The right contained in the Fifth Amendment that the accused in a criminal trial in the federal court shall not be compelled to be a witness

against himself includes both the right not to testify and the right that such failure to testify shall not be subject of comment by the attorney for the prosecution. *Wilson* v. *United States,* 149 U.S. 60; *Ing* v. *United States,* 278 F(2) 362, 367, C.A. 9th; *De Luna* v. *United States,* 308 F(2) 140, 142-143, 154, C.A. 5th; *United States* v. *Ragland,* 306 F(2) 732, 736, C.A. 4th, cert. denied, 371 U.S. 949. See also: *Johnson* v. *United States,* 318 U.S. 189, 196-197, rehearing denied, 318 U.S. 801; *McKnight* v. *United States,* 115 F. 972, 982, C.A. 6th.

At the time of the briefing by the parties of this case, their contentions were as follows: Appellee contended that the constitutional right against self-incrimination under the Fifth Amendment is applicable only to trials in the federal courts, and that it is not applicable to trials in the state courts. It was so held in *Adamson* v. *California,* 332 U.S. 46, rehearing denied, 332 U.S. 784; and *Twining* v. *New Jersey,* 211 U.S. 78.

Article I, Section 10 of the Constitution of Ohio, provides, in part, as follows:

> "No person shall be compelled, in any criminal case, to be a witness against himself; but his failure to testify may be considered by the court and jury and may be made the subject of comment by counsel."

Section 2945.43 of the Revised Code of Ohio contains substantially the same wording.

Appellee relied upon the foregoing Supreme Court decisions and the Ohio constitutional and statutory provisions in support of the right of the State to comment upon the failure of appellant to testify.

Appellant contended that although there is no specific provision in the United States Constitution granting in express words this right to the accused in a criminal trial in a state court, the right is nevertheless guaranteed by

the Due Process Clause of Section 1 of the Fourteenth Amendment. He conceded that the Supreme Court had held that the Fourteenth Amendment does not automatically protect against infringement by the State of the rights included in the first eight amendments to the Constitution of the United States, which are protected against infringement by the federal government. *Palko* v. *Connecticut,* 302 U.S. 319, 323-324; *Knapp* v. *Schweitzer,* 357 U.S. 371, note 5 at p. 378, rehearing denied, 358 U.S. 860. It was also recognized that the Supreme Court had specifically ruled that the privilege against self-incrimination granted by the Fifth Amendment was not safeguarded against state action by the Fourteenth Amendment. *Twining* v. *New Jersey, supra,* 211 U.S. 78; *Adamson* v. *California,* supra, 332 U.S. 46; *Cohen* v. *Hurley,* 366 U.S. 117, 127-128, rehearing denied, 374 U.S. 857; *Knapp* v. *Schweitzer,* supra, 357 U.S. 371, 374-375. Appellant's argument was that recent decisions of the Supreme Court indicated that the ruling with respect to self-incrimination would be reconsidered and that the Court would rule that the Fifth Amendment's exception from compulsory self-incrimination is also protected by the Fourteenth Amendment against abridgment by the states.

On June 15, 1964, the day before the oral argument of this appeal, the Supreme Court in *Malloy* v. *Hogan,* 378 U.S. 1, reconsidered its previous rulings and held that the Fifth Amendment's exception from self-incrimination is also protected by the Fourteenth Amendment against abridgment by the states.

Appellee points out in a supplemental brief that in the *Malloy* case the accused was punished for contempt of court for refusing to answer questions on the ground that it might tend to incriminate him, while in the present case the appellant was not called upon to testify or to answer any questions. We find no merit in this factual distinction. As

pointed out hereinabove, the protection against self-incrimination under the Fifth Amendment includes not only the right to refuse to answer incriminating questions, but also the right that such refusal shall not be commented upon by counsel for the prosecution.

The ruling in the *Malloy* case is controlling. *Bush* v. *Orleans Parish School Board,* 188 F. Supp. 916, E.D. La., affirmed, 365 U.S. 569.

The order of the District Court is set aside and the case remanded to the District Court for further proceedings consistent with the views expressed herein.